D. FREEBORN *et al.* (*Defendants*) .....APPELLANTS;

AND

HENRY G. GOODMAN (*Plaintiff*) .....RESPONDENT.

1968
*June 7, 11, 12
1969
June 16

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Mortgages—Developer conveying apartment building to company and taking back second mortgage—Exclusive right of occupancy of individual suites sold to proprietary lessees—Whether priority of interest conveyed to proprietary lessees over that of assignee of second mortgage.

On June 15, 1959, F entered into an agreement with B Ltd. for the sale to B Ltd. of a parcel of land on which he had commenced the construction of an apartment building. B Ltd. had recently been incorporated by F, and, at the time was controlled by him. B Ltd. agreed to buy the lands and premises with the apartment building "completed and equipped" for $844,500, which was to be paid by the assumption of a first mortgage on the premises in the amount of $310,000 and the sale of the exclusive right of occupancy of the apartment suites. Such sales were to be in accordance with the terms set out in a form of offer to purchase attached to the agreement. F agreed to accept as security a second mortgage if B Ltd. could not pay him the balance of the purchase price in cash on the closing date. As a further protection it was stipulated in the agreement that F was to be entitled to retain possession of all unsold suites until he had been paid in full.

The offer to purchase, which incorporated by reference a form of agreement and lease, contemplated the sale by B Ltd. of the exclusive right of occupancy of a suite in the apartment building and that one share of B Ltd. was to be issued in respect of each dollar paid by the purchaser who could make payment either wholly in cash or partly in cash and the balance by assuming part of the total mortgage encumbrance against the apartment premises.

Although the appellant purchasers went into possession of their suites in accordance with the terms of the agreement and lease, the document itself was not signed by any of them until the amount of the second mortgage had been determined. The executed agreements were dated April 1, 1960, which was one day after the date of the deed to B Ltd. and the second mortgage to F Ltd., the nominee of F, and twenty-five days prior to the recording of the latter document.

In 1961 the second mortgage was assigned for value to one S in trust and in 1963 was assigned by S without consideration to the respondent. At the time S took he had full knowledge of all dealings between the F companies and the appellants.

As a result of having recovered a judgment *nisi* against B Ltd. for foreclosure of the second mortgage, the respondent demanded that from April 1, 1964, the appellants should vacate their respective suites or enter into a rental determined by him. Following their refusal to comply with his demand, the respondent brought an

*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Spence JJ.

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action for possession of the suites and for payment of occupation rent with respect thereto. The appellants claimed the right to retain possession so long as they made the payments stipulated in their agreements with B Ltd. At trial, it was held that they were licensees, with a contractual right to exclusive possession which they could maintain against the respondent. The respondent's appeal was allowed by unanimous decision of the Court of Appeal. From that judgment an appeal was brought to this Court.

Held (Martland J. dissenting): The appeal should be allowed and the trial judgment restored.

Per Cartwright C.J. and Judson, Ritchie and Spence JJ.: Each of the appellants acquired by way of purchase an equitable title to the exclusive right of occupancy of their respective suites and to quiet possession thereof so long as they remained the owner of the shares allotted to them in B Ltd. and were not in default under the terms of the agreement and lease.

The question of priority as between the interests of the appellants and that of the respondent was dependent upon the nature of the interest vested in B Ltd. at the time when the second mortgage was executed on March 31, 1960. It was apparent that on that date when F executed the deed to B Ltd. he had, in concert with that company and in accordance with the terms of the agreement of sale, already divested himself of the interest conveyed to the appellants and that this was well known and accepted by F Ltd. and by the successive holders of the second mortgage. It followed that the interests conveyed to the appellants were no longer the property of B Ltd. to mortgage, and that the property mortgaged to F Ltd. was then encumbered to the extent of the suites which it had sold.

Under the special circumstances of this case the equities against the recognition of an outstanding vendor's lien outweighed those in favour of it. The second mortgage was a security which was entirely independent of the lien and which was from the very outset contemplated as being accepted by F as full payment and therefore as a substitution for any unpaid vendor's lien which might otherwise have been outstanding.

Accordingly, the judgment *nisi* rendered in favour of the respondent against B Ltd. for foreclosure of the second mortgage did not clothe him with any right to disturb the appellants in the quiet enjoyment of the apartment suites acquired by them pursuant to the agreement of sale and the offer to purchase and agreement and lease which were annexed thereto.

Per Martland J., *dissenting*: The agreement of June 15, 1959, contemplated that, in entering into agreements for the occupancy of suites, B Ltd. could only do so on the basis of an agreement with the occupants which specifically recognized the existence of a second mortgage on the whole of the lands and premises. B Ltd., in dealing with the appellants, carried out this obligation. The fact that most of the appellants took possession of their suites before signing the final agreements with B Ltd. did not alter the position, in view of the fact that each suite occupant did sign such an agreement, which, by its terms, replaced all prior agreements, and which specifically acknowledged the amount of the second mortgage against the whole of the lands and premises.

The position was, therefore, that B Ltd. could not grant any right or interest in the lands which was not subject to the second mortgage, and that, in fact, it never purported to do so.

The agreement of B Ltd. to give a second mortgage to secure the balance of the purchase price was performed, and the second mortgage was executed and registered. The second mortgagee, therefore, had equitable rights prior to any rights of the appellants, which mortgagee's rights, in due course, were assigned to the respondent.

Also, as held by the Court below, the submission that there was an equitable estoppel which precluded F, and his successors, from asserting priority for the second mortgage as against the appellants should fail.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Donnelly J. Appeal allowed, Martland J. dissenting.

A. S. Pattillo, Q.C., and *J. W. Garrow*, for the defendants, appellants.

S. L. Robins, Q.C., for the plaintiff, respondent.

The judgment of Cartwright C.J. and Judson, Ritchie and Spence JJ. was delivered by

RITCHIE J.:—This is an appeal brought with leave of this Court from a unanimous judgment of the Court of Appeal for Ontario[1] which allowed an appeal by the respondent from a judgment of Donnelly J., whereby he had dismissed the respondent's action against the appellants for possession of certain apartment suites occupied by them and for payment of occupation rent with respect thereto.

The respondent's claim was asserted as the result of his having recovered a judgment *nisi* against Hamilton Benvenuto Apartments Limited (hereinafter called Benvenuto) for foreclosure of a second mortgage dated March 31, 1960, and recorded on April 26 of that year, made by Benvenuto as mortgagor in favour of Frisina Enterprises (Hamilton) Limited (hereinafter called Frisina Enterprises), which second mortgage was assigned for value to one Samuel Stein in trust and by him assigned without consideration to the respondent who is his partner. The Benvenuto Company, of which all the appellants are shareholders, was the owner of an apartment building in which they all occupied apart-

[1] [1968] 1 O.R. 105, 65 D.L.R. (2d) 545.

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ment suites, the exclusive right of occupancy to which had been sold to each of them in accordance with certain agreements which will hereafter be discussed.

The practical question here at issue between the parties is whether or not the interests purchased by the appellants in the Benvenuto apartment building should take priority over the respondent's interest as assignee of the second mortgage. The learned trial judge found that the appellants had acquired a licence to occupy their apartments coupled with a contractual interest of which the respondent had full notice when he took the assignment of the second mortgage, and that the appellants' title therefore took precedence over that of the respondent; whereas Mr. Justice Laskin, in the reasons for judgment which he rendered on behalf of the Court of Appeal, treated the appellants as having acquired no interest in land which could take precedence over the respondent's mortgage and found that in any event there was an outstanding interest by way of unpaid vendor's lien to which the respondent fell heir as the assignee of the second mortgage and that this took priority over any interest which the appellants may have acquired.

This litigation arises out of the implementation of a plan or scheme devised by one Alfonso Frisina in the spring of 1959 for financing the construction and operation of a 48-suite apartment building to be erected on property owned by him in Hamilton. As will hereafter appear, Frisina's plan was to a great extent modelled on the type of co-operative housing arrangement which in the past has been more commonly used in the United States of America than in this country, but it will be seen that the method here employed departed in certain essential respects from the procedure which is usually employed in such cases.

The essence of the Frisina scheme can best be explained by reference to the agreement of sale dated June 15, 1959, by which he conveyed the apartment building to Benvenuto, a company which had then issued only five shares, all of which were owned or controlled by Frisina.

The agreement discloses that Frisina had mortgaged the premises in August, 1958, in the amount of $310,000 to the London Life Insurance Company and had commenced the construction of the apartment building. Benvenuto agreed to buy the lands and premises with the apartment building "completed and equipped" for $844,500, which was to be

paid by the assumption of the London Life mortgage and the sale of the exclusive right of occupancy of the apartment suites, and it was provided also that:

> If on the closing of the transaction herein the Company is unable to pay to the vendor the whole of the balance due on closing, namely, Five Hundred and Thirty-Four Thousand and Five Hundred Dollars ($534,500.00)...then on account of such deficiency and to the extent of such deficiency the vendor agrees to take back a second mortgage on the said lands and premises and the said forty-eight suite apartment building...

In order to afford greater security to Frisina, the vendor, it was also provided:

> ...that until all the suites in the said forty-eight suite apartment building shall have been sold and the vendor shall have been paid the full balance of the purchase of the said apartment building and premises as aforesaid, then the vendor shall be entitled to retain possession of all such unsold suites upon payment to the Company of the monthly operating charge, as referred to and defined in the said Offer to Purchase (appendix A), designated in respect to such unsold suites and the vendor shall further be entitled to sell the same to such person or persons as the said vendor may deem fit, ...

In my view the paramount condition pursuant to which the company was to acquire title under this agreement is that contained in para. 7 which reads:

> The Company agrees to sell the exclusive right of occupancy of the suites in the said forty-eight suite apartment building at the prices shown in and in accordance with the terms and conditions set out in the form of Offer to Purchase attached hereto as Appendix A.

It is important in considering the nature of the title which Benvenuto conveyed to the purchasers of suites to bear in mind the fact that their occupancy was in all cases controlled by the terms of an "Offer to Purchase" which incorporated by reference a form of "agreement and lease" which was designed to be executed before possession was taken but which was in fact not signed by any of the appellants until some considerable time later. It is enough to say of the form of "Offer to Purchase" that it clearly contemplated the sale by Benvenuto of the "exclusive right of occupancy" of a "suite in the apartment building known as Benvenuto Apartments" and that one share of the Benvenuto Company was to be issued in respect of each dollar paid by the purchaser who could make payment either wholly in cash or partly in cash and the balance "by assuming part of the total mortgage encumbrance against the said apartment building premises".

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The terms of the form of "agreement and lease", however, require closer examination. Throughout this document the purchasers are referred to as "proprietary lessees" and although no second mortgage was in existence when the form of "agreement and lease" was prepared, and, if all had gone well and all the apartments had been sold there would have been no need for such an encumbrance, there is, nevertheless, an express reference to it in the third recital which reads:

> AND WHEREAS the said described lands and premises are vested in the Company subject to a first mortgage in favour of the London Life Assurance Company for $310,000.00 with interest at 6¾% per annum, and... subject to a second mortgage in favour of Alfonso Frisina securing the sum of $ with interest at 6¾%, which second mortgage shall be an open mortgage (it being the intention of all parties that the second mortgage shall if possible be paid off in full out of the proceeds of moneys paid by the Proprietary Lessees in respect of the said apartment suites and the said car parking spaces sold under the terms of this agreement).

All but three of the appellants had entered into the agreements and had taken possession of their suites before March 1, 1960, and of the other three, the appellant Swan, who had by that time also entered into possession, had acquired his title from a Mr. Airey, who was one of the original "proprietary lessees" and the other two appellants had acquired title through Frisina himself and had also signed the agreement before March 1, 1960. As to the respective positions of the appellants, I adopt the approach taken by Mr. Justice Laskin when he said, speaking on behalf of the Court of Appeal:

> Following the execution of the agreement of June 15, 1959, between Frisina and Benvenuto the former proceeded thereunder to arrange for sales of exclusive rights of occupancy of the various suites. In this connection it is unnecessary to distinguish the positions of those defendants who were original occupants and those who bought unsold suites held by Frisina and those who took an approved assignment from an original occupant. I shall take it that the defendants went into possession of their respective suites between September 14, 1959 and March 1st, 1960 (after entering into agreements with Benvenuto in the form of the specimen offer to purchase.)

The singular feature of the last-quoted recital is that at the time when the purchasers, or their predecessors in title signed the form of "Offer to Purchase" which was in each case accepted by Benvenuto, and of which the "agreement and lease" forms a part, Frisina had not yet deeded the property to Benvenuto and all concerned with the trans-

action knew perfectly well that there was no second mortgage in existence and that the agreement under which Benvenuto was purchasing the building from Frisina made it clear that such a mortgage would only be given if the company was unable to pay the whole of the balance of the purchase price on closing.

The second and fourth clauses of the form of "agreement and lease" indicate the nature of the interest which was purchased by the appellants and which Benvenuto intended to convey. Clause 2 provides that:

> Each Proprietary Lessee shall be entitled to exclusively use and enjoy the apartment suite set opposite his or her name in the second column of said Schedule "B" so long as such Proprietary Lessee is the owner of all the shares set opposite his or her name in the eighth column of the said schedule "B" and on condition that such Proprietary Lessee abides by the terms and conditions of this agreement including the rules and regulations established by the Company as hereinafter provided.

Clause 4 of the agreement provides that:

> So long as each Proprietary Lessee is the owner of the shares set opposite their respective names and is not in default under this agreement and fully complies with all rules and regulations established by the Company, such Proprietary Lessee shall have quiet possession of the apartment suite set opposite such Proprietary Lessee's name.

Clauses 10 and 11 of the same document contain some interesting provisions describing the company's powers in the event of default by the proprietary lessees. Clause 10 provides that if the default continues for more than one month

> ...then the Company may on one month's written notice to such Proprietary Lessee, if default continues, retake possession of the said apartment suite occupied by such Proprietary Lessee or his sub-tenant.

And cl. 11 reads:

> And it is further covenanted, declared and agreed that in the event of default having occurred in the payment of any sum payable as aforesaid by any Proprietary Lessee to the Company, the Company may (notwithstanding any other right or power of the Company) distrain therefor upon the lands, tenements, hereditaments, and premises of the Proprietary Lessee and by distress warrant recover by way of rent reserved, *as in the case of a demise,* so much of such sum as shall remain in arrears and unpaid together with all costs attending such distress.

(The italics are my own).

The 12th clause of this document provides that:

> 12. This agreement shall replace any previous agreement or agreements entered into by any of the proprietary lessees with reference to the ownership, use and occupancy of the said apartment suites.

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Although the appellants had taken possession of their suites to the extent hereinbefore indicated in accordance with the terms of the agreement and lease, the document itself was not signed by any of them until the amount of the second mortgage had been determined and inserted in the third recital. The executed agreements are dated April 1, 1960, which is one day after the date of the deed to Benvenuto and the second mortgage to Frisina Enterprises and twenty-five days prior to the recording of the latter document.

It will be seen from all the above that the title to the premises and apartment building taken by Benvenuto under the agreement of sale of June 15, 1959, was subject to its agreement to sell the exclusive right of occupancy of the suites and in my opinion as each such suite was sold in accordance with this agreement, the interest of Benvenuto was diminished to the extent that it had conveyed to another the exclusive right of occupancy of its building. The only title which Benvenuto acquired by the deed of March 31, 1960, and which it had to dispose of on the same date when it gave the second mortgage to Frisina Enterprises Limited was, in my opinion, encumbered by reason of the sales which had already been made. In the course of his reasons for judgment, Mr. Justice Laskin makes something of the fact that the date upon which the form of agreement and lease was executed by the purchasers is not established by the evidence and may well have been after the second mortgage but, as I have indicated, he accepts the fact that the defendants went into possession of their respective suites before the second mortgage was given and in accordance with the offer to purchase which incorporated the form of agreement and lease. I think that the purchasers must be treated as having acquired whatever title they did acquire at the time when they took possession in accordance with the offer.

It will be apparent from the passages which I have quoted from the "Offer to Purchase" and the "Agreement and Lease" that what was conveyed by way of sale to the purchasers or "tenant lessees" was "the exclusive right of occupancy" of a suite in the apartment building with quiet possession thereof for so long as each of them continued to be the owner of the shares alloted to them and was not in default under the agreement. There is elaborate

provision in clauses 10 and 11 of the "Agreement and Lease" for eviction of any tenant lessee who is in default, including a covenant to the effect that in such event Benvenuto could distrain for recovery "by way of rent reserved, as in the case of a demise", but there is no suggestion that any of the appellants was at any time in default and in my view until such default occurs, no "proprietary lessee" could be subject to eviction at the suit of Benvenuto. As I mentioned at the outset, the scheme employed for the financing and operation of the apartment building was in many respects based on the method devised for financing similar undertakings in the United States of America. This is made evident by reference to an article on Co-operative Apartment Housing in 61 Harvard Law Review at p. 1408 where it is said:

> A co-operative apartment house requires legal machinery which will give the individual tenant-owner something closely approximating "title to a slice of air," while reserving to a collective entity the function of management and the power to assure proportional sharing of common expenses. Customarily, the promoter initiating the venture organizes a corporation, which acquires the land and building, normally subject to a mortgage. The prospective tenant-owner buys a block of shares corresponding to the value of the apartment to be occupied, receiving also a long-term or renewable lease. Rent is nominal, but the board of directors, elected by the tenant-shareholders, makes assessments for current expenses as well as for payments of interest and principal on the mortgage. The leases include provision for forfeiture at the option of the corporation on failure to pay assessments or on assignment without the consent of the board of directors.

The most essential difference between Frisina's scheme and the model upon which it appears to have been based, is that in the case of the present proprietary lessees the duration of the term of their occupancy was not fixed by specifying the number of years in the first instance or by reference to some collateral matter in itself certain or capable of being rendered certain. I agree with the submission of the respondent that by reason of this omission the interests taken by the appellants cannot be said to be leases in the strict sense of the word, but in a case such as the present one where the tenant lessees have taken possession for valuable consideration and where their tenancy is terminable only on default, I do not think that the failure to fix a term is to be construed as cutting down the extent of the interest conveyed to them under the provisions of the "agreement and lease".

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In the case of *The Trust and Loan Company of Canada v. Lawrason*[2], the question to be determined was whether the Trust and Loan Company, by reason of the terms of the mortgage held by it, was to be treated as having redemised certain lands so as to create a landlord and tenant relationship whereby mortgage payments were to be considered as rent so that they would rank in priority to the claims of other creditors. The mortgage contained an "attornment" clause as follows:

> ...and the mortgagor does release to the Company all his claims upon the said lands and doth attorn to and become tenant at will of the Company subject to the said proviso,...

and there was also a provision for the mortgagor to distrain for arrears of interest after notice "as in the case of the demise of said land" and there was a covenant that until default of payment the mortgagor should have quiet possession. The Court of Appeal held that there was no fixed term and that the interest payments could not be treated as "fixed rent" under a tenancy. This Court was equally divided but the reasons for judgment affirming the Court of Appeal were written by Mr. Justice Strong who, in rejecting the argument that a tenancy at will was created by the attornment clause said:

> This attornment clause appears to be so utterly inconsistent with the proviso, that the mortgagor should have quiet possession until default, that the one or the other of these clauses must be void for repugnancy. The mortgage deed, operating as a conveyance to the mortgagee of the whole fee, these provisions are in the nature of redemises to the mortgagor, and, therefore, must be construed beneficially to the mortgagor, and strictly against the mortgagee, who is in the position of a grantor as regards them. Then it being impossible to reconcile a tenancy at will, that is, a tenancy determinable at the will of the mortgagee, under which the latter can, at any time, take possession, with a provision, though in form but a mere personal covenant, that the mortgagor shall remain in quiet possession until default in payment; one or the other of these two clauses must necessarily give way, and upon the principle of construction just stated, it is clear that this must be the attornment clause being less beneficial to the mortgagor. It is no answer to this argument to say that the tenancy at will can subsist with the collateral personal convenant of the mortgagee not to take possession until default, for such a covenant would be enforced specifically by a court of equity, which would restrain the mortgagee from taking possession in violation of its terms, and thus there would arise a direct repugnancy between such a provision and a tenancy at will.

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[2] (1882), 10 S.C.R. 679.

Mr. Justice Strong went on to say, at p. 704:

> Then, the tenancy at will created by express words in the attornment clause being thus rejected we have only to deal with the provision that the mortgagor shall hold until default in payment of principal or interest at the times stipulated in the deed; if any tenancy is created it must be by that clause. Now, when I say that this clause is in the nature of a redemise, I do not mean to say that it creates a strict legal tenancy, that it confers upon the mortgagor a chattel interest amounting to a legal term, for it has been determined—and upon long established principles of the law relating to leases and terms for years, it could not be otherwise held—that the uncertainty in the duration of the term is fatal to such a construction, though, *as I have before said, the covenant is one which a court of equity would undoubtedly enforce by restraining the mortgagee from ejecting the mortgagor before default.*

The italics are my own.

I think that at the very least the interest taken by the appellants in the present case was a demise secured by a covenant for quiet possession which a court of equity would undoubtedly enforce by restraining Benvenuto from ejecting any of them before default, and as the second mortgagee and its assignee Stein and the respondent who took his assignment without consideration, must all be taken to have had full knowledge of all the circumstances, including the covenant for quiet possession, I conclude that the respondent was bound by that covenant which is enforceable at equity by restraining him in the same manner as it would have been enforceable against Benvenuto.

Not only must the respondent be taken to have had notice of the interests of the appellants, but the appellants were in actual occupation of their suites when the second mortgage was given, and in this regard reference may be had to the case of *Barnhart v. Greenshields*[3], decided in the Privy Council in 1853, which appears to be accepted as a modern authority. (See Halsbury's Laws of England, 3rd ed., vol. 14, p. 546 and vol. 34 at pp. 303 and 366, and Hanbury's Modern Equity, 8th ed., at p. 33.) In that case at p. 33 their Lordships accepted the statement of the rule governing such circumstances as made by Sir James Wigram in the case of *Jones v. Smith*[4], where he said:

> If a person purchases an estate which he knows to be in the occupation of another than the vendor, he is bound by all the equities which the party in such occupation may have in the land...for possession is *prima facie* evidence of seisin in fee.

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[3] 9 Moo. P.C.C. 18, 14 E.R. 204. [4] (1841), 1 Hare, 43 at 60.

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The exact factual situation in the present case appears to be a unique one and an extensive search of the authorities has not resulted in the discovery of any decided cases which characterize the exact interest acquired by the purchasers in terms of any of the categories heretofore accepted by the courts, but it appears that similar situations have arisen in the United States and have given rise to a comment in a work entitled *The Influences of the Metropolis on the Concepts, Rules and Institutions Relating to Real Property,* 1954, which is quoted in an article in 18 Stanford Law Review at p. 1328 as follows:

> In some of these cases the question has arisen as to the extent and quality and legal character of the interest which is possessed by a purchaser of a co-operative apartment who is commonly called a 'tenant owner'. The question remains largely unanswered. Some of the courts in discussing the question have expressly refused to give the interest a name, while others have used the designations ranging from 'tenancy' through 'equitable title'. Apparently there has arisen in the field of real property a type of interest, peculiar to the co-operative apartment concept, which does not fit precisely in any of the ancient legal pigeonholes and which is not fully or adequately defined by existing legal terminology

The learned trial judge expressed the opinion that the appellants

> ...are licensees with a contractual right to exclusive possession of the apartments which they occupy so long as they retain the shares and comply with the terms of the agreement; and to sell such shares to a purchaser with the approval in writing of the Board of Directors of the Company and to assign to such purchaser all their rights under the Agreement with the Company, including the right to use and occupy the accommodation covered by the agreement.

In support of this proposition, reference was made to the case of *Errington v. Errington*[5], but I take the facts of the present case as being more favourable to the appellants than they were to the licensees in that case, and I think that what each of the appellants acquired by way of purchase was an equitable title to the exclusive right of occupancy of their respective suites and to quiet possession thereof so long as they remained the owner of the shares allotted to them in Benvenuto and were not in default under the terms of the agreement and lease.

It appears to me to be fitting at this point to make reference to the fact that in the course of purchasing their exclusive rights of occupancy, although the appellants ap-

[5] [1952] 1 All E.R. 149.

pear to have been dealing with three different entities, they were in fact dealing with only one controlling mind, namely that of Alfonso Frisina. Mr. Frisina incorporated Benvenuto and all its original five shares were held by or for him. This was the company to which he eventually conveyed the apartment house and with which the appellants entered into their agreements for exclusive occupancy of the suites. Frisina also incorporated Frisina Enterprises which was destined to become the second mortgagee and which ultimately assumed a number of administrative obligations in respect of the apartment building.

Mr. Justice Laskin said in the course of his reasons for judgment that this method of doing business was "a permissible device" and there can be no quarrel with this description. It was certainly a device and it was a permissible one having regard to the rule in *Salomon v. Salomon & Co.*[6] It is no part of my reasoning that the corporate veil should be pierced, and at this stage I am only referring to Frisina's method of operation in order to make it plain that at all times each of Frisina, Benvenuto and Frisina Enterprises knew exactly what the other was doing and no undertakings were made by one without the knowledge of the others. It is also significant to note that Frisina Enterprises, which was controlled by Frisina, was designated by him as the second mortgagee and it is to be appreciated that Mr. Stein, to whom Frisina Enterprises and Frisina assigned the second mortgage, took it with full knowledge of all the dealings between the Frisina companies and the appellants and that the present respondent is in this regard in the same position as Stein.

As I have indicated, I think that the question of priority is dependent upon the nature of the interest vested in Benvenuto at the time when the second mortgage was executed on March 31, 1960, and as I have said, I think it to be apparent that on that date when Frisina executed the deed to Benvenuto he had, in concert with that company and in accordance with the terms of the agreement of sale, already divested himself of the interest conveyed to the appellants and that this was well known and accepted by Frisina Enterprises and by the successive holders of the second mortgage. It follows, in my view, that the interests

[6] [1897] A.C. 22.

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conveyed to the appellants were no longer Benvenuto's property to mortgage, and that the property mortgaged to Frisina Enterprises was then encumbered to the extent of the suites which it had sold.

It was argued on behalf of the respondent that the fact that the forms of "agreement and lease" which were not signed until April 1 or later and which each contained a recital specifying the amount of the second mortgage should, having regard to para. 12 thereof, be treated as replacing any previous agreement and as acknowledging the priority of the Frisina Enterprises' mortgage. There appears to me to be a number of answers to this contention. In the first place the "agreement and lease" which was finally signed contained all the same covenants as the document which was attached to the original offer to purchase, including the stipulation that the proprietary lessees were "to be entitled to exclusively use and enjoy the apartment suite set opposite his or her name" and the covenant for quiet possession of the suites and I think that these covenants must be treated as evidencing the recognition by all concerned that the mortgage referred to in the recital was a mortgage of property from which the interest of the proprietary lessees had already been carved out. In this regard it is to be remembered that the second mortgage was dated one day before the signed forms of "agreement and lease" and that it was not recorded until twenty-six days later.

In the second place, it is to be noted that the mortgagee was not a party to the "agreement and lease" and it is difficult to understand how its successor can invoke this document in aid of his claim to priority.

I think it should be noted also that the only mention of the contemplated second mortgage in the original offer to purchase was in the following terms:

> ...the Purchasers covenant and agree that they will not in any manner whatsoever, alienate or encumber or cause to be alienated or encumbered, the said lands and premises, or any part thereof, prior to the date upon which the full proceeds of the said mortgage, including any holdback have been received by the Vendor Company *and the second mortgage, referred to in the said form of agreement and lease attached hereto, has been registered.*

(The italics are my own.) It is difficult to give any clear meaning to this language without concluding that the

vendor and the purchasers recognized that the interest which was conveyed was one which was capable of and could be "alienated or encumbered" and that the purchasers were agreeing not to alienate or encumber their interests until the first mortgage had been fully advanced and the second mortgage had been registered. In my view this presupposes the conveyance to the purchasers of an equitable interest in the apartment building which vested in them prior to the execution and registration of the second mortgage. When this language is considered in conjunction with the various agreements which were entered into for the purpose of implementing the Frisina scheme for selling the apartment suites, it appears to me to confirm the view that Benvenuto had divested itself of the exclusive right to occupy the suites which it sold before it entered into the second mortgage.

Although no evidence was given at the trial by either the respondent or his partner, Mr. Samuel Stein, the letter written by their law firm to Benvenuto on March 29, 1962, clearly indicates that they recognized the prior interests of the appellants over the second mortgage which was then held by Stein. The first paragraph of that letter reads as follows:

> We wish to advise you that we act for the second mortgagee on the above-mentioned property and *inasmuch as the second mortgage is encumbered with collateral agreements covering the sale of the co-operative apartments,* we feel that we must request copies of the yearly financial statements of the Hamilton Benvenuto Apartments Limited.

The italics are my own.

In my view the matter could not have been put more accurately and I conclude that everybody concerned recognized that the second mortgage was encumbered in the manner described in this letter.

In the course of his reasons for judgment, Mr. Justice Laskin gave expression to the opinion that even if the appellants had such an equitable interest, their title was nonetheless subject to Frisina's prior equitable interest as unpaid vendor. In this regard Mr. Justice Laskin said:

> Even if it be assumed that the defendants have an equitable interest by reason of their contractual licences to occupy certain apartment suites, Frisina had a prior equitable interest, an equitable charge as unpaid vendor, under the agreement for sale of June 15, 1959: see *Cave v. Cave* (1880), 15 Ch. D. 639. An equitable charge arises in favour of the unpaid vendor of an equitable estate which he has agreed to sell no less

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than in the case of an agreement of sale of a legal estate. Further, the defendants had notice of this prior interest (commonly, although not quite accurately, called a vendor's lien) which must, on this ground at least, rank ahead of their own. The present case does not compel a determination whether the contractual licences should be given the dignity of equitable interests in land or whether they should be regarded, at best, as mere equities which must be either personal as between the parties or might enjoy a farther reach but short of binding a subsequent purchaser for value and certainly short of binding a subsequent purchaser for value without notice. I refer in this connection to a recent consideration of these matters in *National Provincial Bank Ltd. v. Ainsworth,* [1965] A.C. 1175, [1965] 2 All E.R. 472; and see also *Hanbury,* Modern Equity, 8th ed., pp. 29, 428 ff.

It appears to me that the views so expressed on behalf of the Court of Appeal are fundamental to the reasoning upon which its decision was based and should therefore be considered in some detail.

With the greatest respect, I am unable to find direct authority in the cases which Mr. Justice Laskin has cited for the propositions which he has stated so clearly, but even proceeding on the assumption that an equitable charge in favour of an unpaid vendor may arise immediately upon his entering into an agreement for sale, it has, I think, been recognized in the past that there may be situations in which the conduct of the vendor or the terms under which the sale is made or other circumstances make it inequitable to allow the vendor to retain his lien. In this regard reference may be had to *Austen v. Halsey*[7], *per* Lord Eldon at p. 483; *Rice v. Rice*[8]; *Mathers v. Short*[9]; *Kettlewell v. Watson*[10]. In my opinion the principle to be followed is well expressed in the judgment of Spragge V.C. in *Boulton v. Gillespie*[11], where he said at p. 228:

Prima facie, certainly the lien exists, and it lies upon the grantee to rebut it. It is the vendor's "natural equity," as it has been termed, to have a lien on his estate until he has been paid for it; but the vendee may show, I apprehend, that under the circumstances of the purchase it is not equitable that such a lien should be retained, and if he can shew that the retention of such lien would defeat or even materially interfere with the known object of the purchase, so as to clog it with difficulties which it is reasonable to conclude that the parties could not have intended that the purchase should be incumbered with; then I think he rebuts the vendor's *prima facie* equity and establishes a state of things under which the retention of a lien would be the reverse of equitable. It is sometimes put—that the parties indicate an intention that the lien should not be preserved—sometimes that the intention to retain a lien is

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7 (1801), 6 Ves. 474, 31 E.R. 1152.
8 (1854), 2 Drew. 73, 61 E.R. 646.
9 (1868), 14 Gr. 254.
10 (1884), 26 Ch.D. 501.
11 (1860), 8 Gr. 223.

negatived; but inasmuch as the right to a lien does not grow out of contract or intention, but out of the natural equity of the vendor, it seems to follow that wherever it can be shewn to be more equitable that the purchaser should have his land free from the lien, than that the vendor should retain it, no lien for unpaid purchase money can exist, for the equity against it outweighs the equity in favour of it...

Under the agreement of June 15, 1959, Frisina *agreed* to accept as security a second mortgage if Benvenuto could not pay him the balance of the purchase price in cash on the closing date. As further protection it was stipulated in cl. 8 of the agreement that Frisina was to be entitled to retain possession of all unsold suites until he had been paid in full. In my opinion it is reasonable to conclude from this that Frisina never intended to preserve his equitable charge. He had obtained sufficient and adequate security under the agreement. In my view, under the special circumstances of this case the equities against the recognition of an outstanding vendor's lien outweigh those in favour of it. As I have indicated, I have formed the opinion that the interest conveyed to the appellants takes priority over that of the second mortgagee and I should point out that I do not consider that the second mortgage can be treated as the successor or reincarnation of Frisina's vendor's lien. It is a security which is entirely independent of the lien and which was from the very outset contemplated as being accepted by Frisina as full payment and therefore as a substitution for any unpaid vendor's lien which might otherwise have been outstanding. This does not mean that the second mortgagee fell heir to the rights of an unpaid vendor. There was nothing in the nature of an assignment of a vendor's lien and indeed no encumbrance created by the purchaser could possibly have such an effect.

In the course of these reasons I have not dealt with the facts in such detail as did the judges of the Courts below, but I can perhaps summarize my view by saying that I agree with the factual analysis to be found in the judgment of the learned trial judge and that I consider the title of the appellants to have been controlled by the provisions of the agreement of sale of June 15, 1959, and the "offer to purchase" and "agreement and lease" which were annexed thereto. Mr. Justice Laskin has referred to an agreement of April 19, 1960, between Frisina and Frisina Enterprises of the one part and Benvenuto of the other as "an amended agreement", but after careful consideration of the provi-

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sions of that document, I do not consider that it has any material effect on the problem with which we are here concerned.

Having regard to all the above, it will be seen that I do not consider that the judgment *nisi* rendered in favour of the respondent against Hamilton Benvenuto Apartments Limited for foreclosure of the second mortgage clothes him with any right to disturb the appellants in the quiet enjoyment of the apartment suites acquired by them pursuant to the documents hereinbefore discussed.

I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the learned trial judge.

The appellants will have their costs in this Court and in the Court of Appeal.

MARTLAND J. (*dissenting*):—The facts of this case are fully outlined in the reasons for judgment of Laskin J.A., who delivered the unanimous judgment of the Court of Appeal[12], which are, in part, repeated in these reasons.

On June 15, 1959, Alfonso Frisina (hereinafter referred to as "Frisina") entered into an agreement with Hamilton Benvenuto Apartments Limited (hereinafter referred to as "Benvenuto") for the sale to Benvenuto of a parcel of land in the City of Hamilton on which he had commenced the construction of a 48-suite apartment building. Benvenuto had recently been incorporated by Frisina, and, at that time, was controlled by him. The price was $844,500 less the assumption of a first mortgage on the land in favour of The London Life Insurance Company, for $310,000 principal amount, leaving a balance of $534,500 payable by Benvenuto to Frisina on closing. The closing date was October 1, 1959, subject to extension by the vendor to such time as 51 per cent of the issued shares of Benvenuto had been sold.

Clauses 5, 6 and 7 of this agreement provided as follows:

5. The Company hereby irrevocably directs that the full proceeds of the said mortgage made by The London Life Insurance Company and being Instrument No. 66502 H.L. (which mortgage is being assumed by the Company as heretofore set out), be paid to the vendor by The London Life Insurance Company, as and when advances made thereon are approved by The London Life Insurance Company's inspector, not-

[12] [1968] 1 O.R. 105, 65 D.L.R. (2d) 545.

withstanding any direction or stipulation of the Company to the contrary, which may have been or may hereafter be made, and *the Company covenants and agrees that it will not in any manner whatsoever alienate or encumber or cause to be alienated or encumbered, the said lands and premises, or any part thereof, prior to the date upon which the full proceeds of the said mortgage, including any holdback, have been received by the vendor, and the second mortgage (if any) hereinafter referred to has been registered.* If for any reason whatsoever any monies are paid by The London Life Insurance Company to the Company in respect to the said mortgage Instrument No. 66502 H.L. such monies shall immediately be paid by the Company to the vendor.

6. If on the closing of the transaction herein the Company is unable to pay to the vendor the whole of the balance due on closing, namely Five Hundred and Thirty-Four Thousand and Five Hundred Dollars ($534,500.00) as above set out, then on account of such deficiency and to the extent of such deficiency the vendor agrees to take back a second mortgage on the said lands and premises and the said forty-eight suite apartment building (*subject only to the said first mortgage to The London Life Insurance Company,* being Instrument No. 66502 H.L. bearing interest at the rate of 6¾% per annum and for a term of ten (10) years, maturing at the same time as the said first mortgage, repayable at Seven Dollars and Fifty-eight Cents ($7.58) per month per One Thousand Dollars.

7. The Company agrees to sell the exclusive right of occupancy of the suites in the said forty-eight suite apartment building at the prices shown in and *in accordance with the terms and conditions set out in the form of Offer to Purchase attached hereto as Appendix A.*

(The emphasis is my own.)

The agreement contemplated that Benvenuto would sell exclusive rights of occupancy of the suites to persons who would be required to become shareholders of that company and the proceeds realized from the sale of shares and from such rights of occupancy were to be applied to the balance owing to Frisina and to the second mortgage which Frisina or his nominee would take back to the extent of any deficiency in payment of the closing balance.

The specimen Offer to Purchase, referred to in cl. 7, and a following memorandum of agreement, contained a schedule of share allotments and prices assigned to each suite and to parking spaces in the apartment building, and also contained blank columns envisaging proportionate assumptions of first and second mortgage liabilities by persons who did not pay the full cash price for their shares and exclusive right of occupancy of suites. These specimen documents were the basis on which Benvenuto would sell its shares and accompanying rights of occupancy of the various suites.

It is clear from the facts that if all the apartment suites were disposed of at the prescribed prices, Benvenuto would

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be able to pay off Frisina as well as the first mortgagee, and have a balance on hand. As protection, however, to Frisina the agreement of June 15, 1959, provided that until this result was achieved Frisina would retain possession of all unsold suites on payment of the prescribed monthly operating charge assigned to each such suite and would be entitled to sell them under an obligation of Benvenuto to enter into an agreement with the purchasers whereby the sums paid for the appropriate stock subscription would be paid to Frisina to reduce Benvenuto's debt to him. Frisina also retained the right to rent any unsold suites on such terms as he desired. Should the deal with Benvenuto be closed before sale of all the suites, the shares in Benvenuto referable to each unsold suite were to be issued to Frisina who would be liable to pay the monthly mortgage encumbrance charge on each such suite in addition to the monthly operating charge, until the suite was sold. Frisina could also require Benvenuto to sell the suites at a price below that prescribed but in such case the sale price of the apartment building would be correspondingly reduced.

The Offer to Purchase had annexed to it a memorandum of agreement with schedules describing the apartment building land and showing the prices of the various suites (ranging from $13,000 to $22,500) and the number of shares in Benvenuto pertaining to each suite at a cost of $1 per share. There were blank columns in this schedule headed: (1) Share of First Mortgage Assumed; (2) Share of Second Mortgage Assumed (if any); (3) No. of Fully Paid Shares Issued; (4) Portion of Monthly Payment Relating to Total Mortgage Encumbrance Assumed; (5) Portion of Monthly Payment Relating to All Other Company and Apartment Expenses (Estimated); and (6) Total Monthly Payments Presently Estimated. The parties to this memorandum of agreement were to be Benvenuto and the shareholder-occupants of all the suites. It was apparently contemplated that all would join in the one memorandum of agreement but when this document came to be executed in April, 1960, separate documents in the same general terms were prepared for each shareholder-occupant.

It was a term of the Offer to Purchase that the purchasers of the suites (*i.e.*, of the exclusive right of occupancy thereof) would "execute an agreement and lease in the form attached to this Offer before taking possession of the said

apartment suite and (if applicable) the parking space hereinafter referred to." In fact, possession was given in pursuance of the execution of the Offer to Purchase and payment of the sum prescribed as a condition of such possession. Execution of the contemplated "agreement and lease" came later.

The following terms of the Offer to Purchase must be noted. The total price payable thereunder was for the exclusive right of occupancy of a designated suite and for the number of shares corresponding to the total price at $1 per share. Any balance of the purchase price, beyond that portion stipulated as a condition of possession, was payable "by assuming part of the total mortgage encumbrance against the said apartment building premises to the extent of the said amount... and paying for such as hereinafter set out." The reference later was to a sum monthly, called the monthly mortgage encumbrance charge, calculated on the basis of $7.58 per month per thousand dollars of mortgage encumbrance assumed by the purchaser. In addition, the purchaser undertook to pay a monthly operating charge in a specified sum "or such monthly payment as may be fixed from time to time by the directors of (Benvenuto)."

Portions of two other clauses of the Offer to Purchase are relevant:

> ...the Purchasers covenant and agree that they will not in any manner whatsoever alienate or encumber or cause to be alienated or encumbered the said lands and premises, or any part thereof, prior to the date upon which the full proceeds of the (first) mortgage, including any holdback, have been received by (Benvenuto) and the second mortgage, referred to in the said form of agreement and lease attached hereto, has been registered.
>
> The Purchasers acknowledge that they have been advised that (Benvenuto) has agreed to purchase from Alfonso Frisina the said lands and premises...together with the complete 48 Suite Apartment Building erected thereon at the price of $844,500.00. And the Purchasers agree with the Vendor that all monies payable by the Purchasers under this agreement may be disbursed by (Benvenuto) at its discretion and direction to the said Alfonso Frisina in payment of the cost of construction of the said 48 Suite Apartment Building being erected on the said lands and premises, such monies to be credited on account of the purchase price of the said lands and buildings payable by (Benvenuto).

The "agreement and lease" form attached to the Offer to Purchase contains, *inter alia*, a recital and a number of terms which are relevant. The recital states that the apartment property is vested in Benvenuto subject to the first mortgage already mentioned in these reasons and subject

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to a second mortgage in an unstated sum in favour of Frisina, "it being the intention of all parties that the second mortgage shall if possible be paid off in full out of the proceeds of moneys paid by the proprietary lessees in respect of the said apartment suites and said car parking spaces sold under the terms of this agreement." The following numbered clauses of the "agreement and lease" form are relevant:

1. The Company agrees to issue and allot to each of the said Proprietary Lessees the number of shares set opposite each respective owner's name in the eighth column of said Schedule "B" as fully paid and non-assessable shares of the Company, and the Company does acknowledge receipt from each Proprietary Lessee of the amount set opposite their respective names in the fifth column of said Schedule "B". The Company doth further acknowledge that it has not issued and allotted any shares except as set out in the eighth column of said Schedule "B", and the five (5) shares issued to the applicants for incorporation of the Company. The Company further agrees that no additional shares will be issued except to the respective Proprietary Lessee for the number of shares set opposite each respective Proprietary Lessee's name in the third column of said Schedule "B" less the number of shares set opposite such Proprietary Lessee's name in the eighth column of said Schedule "B", and that no additional shares shall be issued until payment therefor is made to the Company.

2. Each Proprietary Lessee shall be entitled to exclusively use and enjoy the apartment suite set opposite his or her name in the second column of said Schedule "B" so long as such Proprietary Lessee is the owner of all the shares set opposite his or her name in the eighth column of the said Schedule "B" and on condition that such Proprietary Lessee abides by the terms and conditions of this agreement including the rules and regulations established by the Company as hereinafter provided.

4. So long as each Proprietary Lessee is the owner of the shares set opposite their respective names and is not in default under this agreement and fully complies with all rules and regulations established by the Company, such Proprietary Lessee shall have quiet possession of the apartment suite set opposite such Proprietary Lessee's name.

5. Each Proprietary Lessee agrees to pay to the Company on the first day of each and every month the sum set opposite such Proprietary Lessee's name in the eleventh column of said Schedule "B" or an amount greater or less than such sum as may be determined by the Directors of the Company expressed in formal resolution of such Directors from time to time, it being intended that the said monthly payments made by all the Proprietary Lessees shall be sufficient to pay and discharge the principal and interest payments on the aforesaid mortgage(s) and all taxes, insurance premiums, janitor's services, heat, repairs and all other expenses incidental to the operation of the lands and apartment building and any incidental expenses in operating the Company. ....

7. Each Proprietary Lessee covenants not to sell, assign, or pledge such Proprietary Lessee's shares of stock set opposite his or her name in said Schedule "B" without selling all such shares to a proposed purchaser nor will such Proprietary Lessee sell his or her shares without the approval to such sale or dealing being first given in writing by the Board of Direc-

tors of the Company. In the event that the Company approves the assignment of any Proprietary Lessee's shares in the Company to any purchaser, the selling Proprietary Lessee shall thereafter cease to be liable for any further payments under this agreement,....

Clause 10 deals with the default of a proprietary lessee in any payments required to be made under the agreement, with breach of any terms and conditions thereof and with breach of any rules and regulations which the Board of Directors of Benvenuto are authorized to make; and provides in certain circumstances that Benvenuto may take possession of the particular suite and sell it. Clause 11 provides for distress by Benvenuto in case of default in any required payments.

12. This agreement shall replace any previous agreement or agreements entered into by any of the Proprietary Lessees with reference to the ownership, use and occupancy of the said apartment suites.

After a selling effort in the late summer and fall of 1959 to fill the apartment building with shareholder-occupants, the various parties moved through solicitors to complete both the corporate and real estate aspects of the interrelated deals. It was not until closing was near that the exact amount of the contemplated second mortgage was determined. Frisina's deed to Benvenuto was dated and executed on March 31, 1960, but was not registered until April 22, 1960. The second mortgage back was also dated March 31, 1960. It recites the amount secured as being $258,391.85 and was in favour of Frisina Enterprises (Hamilton) Limited, Frisina's nominee. When it was actually executed is not clear, but the mortmain affidavit was not sworn until April 19, 1960, and the document itself was not registered until April 26, 1960. It was contended that it was delivered in escrow, awaiting execution on April 19, 1960, of a supplementary agreement between Frisina, his nominated company, which became the second mortgagee, and Benvenuto (which by that time was in the hands of a new Board of Directors consisting of the shareholder-occupants), amending the original agreement of June 15, 1959. The evidence shows that a draft of the amending agreement of April 19, 1960, had been prepared as of March 29, 1960, and that by this date the amount of the second mortgage had been determined.

This amending agreement of April 19, 1960, was made in the light of a statement of adjustments calculated as of

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April 1, 1960, and in the light of the sequential agreements between Benvenuto and its shareholder-occupants who took over direction of Benvenuto on April 5, 1960. These agreements, although dated April 1, 1960, and executed by Benvenuto on that date or between that date and April 4, 1960, were executed by the shareholder-occupants at various dates following April 4, 1960. When these agreements were mailed out for execution they included the ascertained sum of $258,391.85 as the amount of the second mortgage recited therein.

These individual agreements had annexed to them as a schedule a list of the shareholder-occupants of each suite (including those retained by Frisina as unsold) and an attribution in respect of each of the portions of the first and second mortgages assumed by the respective shareholder-occupants, representing the unpaid balances of the total purchase prices of the respective exclusive rights of occupancy; and the schedule also showed the assigned amounts of the monthly maintenance payments.

The agreements of April 1, 1960, were in substance in the terms indicated in the specimen form attached to the Offers to Purchase executed earlier by the shareholder-occupants. In particular, they retained the provision that "this agreement shall replace any previous agreement or agreements entered into by any of the proprietary lessees with reference to the ownership, use and occupancy of the said apartment suites."

Each such agreement contained the following recital:

> AND WHEREAS the said lands and premises are vested in the Company subject to a first mortgage in favour of The London Life Insurance Company for $310,000.00 with interest at 6¾% per annum (collaterally secured by a chattel mortgage to The London Life Insurance Company on all the chattels owned by the Company and contained in the said Apartment Building) and subject to a second mortgage in favour of Alfonso Frisina (or in favour of such mortgagee as he may designate) securing the sum of $258,391.85 with interest at 6¾%, which second mortgage shall be an open mortgage (it being the intention of all parties that the second mortgage shall if possible be paid off in full out of the proceeds of moneys paid by the Proprietary Lessees in respect of the said apartment suites and said car parking spaces sold under the terms of this agreement).

What was added to the individual agreements of April 1, 1960, beyond the terms specified in the specimen form already referred to, were clauses indicating the collective adherence of the shareholder-occupants to their provisions

and to the schedule distributing shares in Benvenuto, the exclusive rights of occupancy attendant thereon and the financial burden of participation in the venture. They also fixed April 1, 1960, as the date on which the prescribed monthly payments assigned to each shareholder-occupant would begin.

The amending agreement of April 19, 1960, provided for the disbursement by Benvenuto of certain money, owing to it by certain listed shareholders, to pay off specified tax and public utility charges and some other debts so as to permit closing on the basis of adjustments as of April 1, 1960. Upon the money being paid over Frisina was to deliver to Benvenuto the resignations of all the first directors, save his own, together with the resignations of the officers of Benvenuto. The amending agreement also confirmed Frisina's right to sell his rights of occupancy and the shares pertaining thereto to persons approved by Benvenuto's board of directors and to rent suites to which he held such rights to persons similarly approved, but such approval was not to be unreasonably withheld. Frisina could require the issue to him of additional shares in Benvenuto at $1 per share or through a reduction in the amount of the second mortgage at that rate per share. In no case, however, could Frisina vote more than 49 per cent of issued stock regardless of his holding more; and he was required at Benvenuto's request to transfer any excess over 49 per cent to a trustee (being either the president or an officer of Benvenuto) to vote them in the best interests of all shareholders.

Stein purchased the second mortgage under an assignment dated June 10, 1961, and registered on July 12, 1961. The mortgage statement supplied in connection with the purchase showed a balance owing on the second mortgage of $228,271.07, rounded off, both in the assignment and in an acknowledgment by Benvenuto to Stein, at $228,273.00. It is admitted that at the time he took, Stein had notice of the two mortgages and had been previously provided with blank and unexecuted forms of (1) the Offer to Purchase to Benvenuto and (2) the memorandum of agreement dated as of April 1, 1960; and had also received a copy of the amending agreement of April 19, 1960. The abstract of title of the apartment property did not show any registered assertion of an interest by any of the share-

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holder-occupants before Stein took. The defendant Walton purported to register her proprietary lease on July 2, 1964, but this was after the crystallization of the issues between the parties.

It appears that the second mortgage was in good standing to the time when Frisina disposed of his shares pertaining to unsold suites to Henry Stenekes Holdings Limited under an agreement dated April 1, 1963. Benvenuto was also a party thereto, giving its consent to the assignment of the shares and the accompanying rights of occupancy.

The plaintiff herein became holder of the second mortgage under an assignment dated May 28, 1963, at which time the amount owing thereon was $216,271.49. Since he did not take for value he stood in no better position than Stein. The claim in the foreclosure action was $219,290.18 and, with interest and costs, the redemption sum as of October 1, 1964, was $226,753.23.

A default foreclosure judgment was obtained by the respondent against Benvenuto on April 1, 1964. The final order of foreclosure was signed on October 2, 1964.

The appellants in occupation of all but three of the suites in issue in these proceedings, and H. Airey, who subsequently assigned his interest to the appellant, Swan, took possession of their respective suites between August, 1959, and March 1, 1960, after signing the written Offers to Purchase, in the specimen form, dated between July 24 and December 30, 1959. Two of the appellants, who purchased rights of occupancy from Frisina, took possession on May 1 and June 25, 1960, respectively.

The present proceedings were brought by the respondent claiming possession of the apartment building. The appellants, occupants of suites in the building, and shareholders of Benvenuto, claim the right to retain possession of their suites, so long as they make the payments stipulated in their agreements with Benvenuto.

At trial, it was held that they were licensees, with a contractual right to exclusive possession which they could maintain as against the respondent. The respondent's appeal was allowed by unanimous decision of the Court of Appeal. From that judgment the present appeal is brought.

In the Court of Appeal, it was apparently conceded by the appellants that their interests in the land did not have

the character of either a leasehold or a freehold estate. While this concession was not made in this Court, the argument of the appellants was, essentially, first, that they had an "equity" which should have priority over the interest of Frisina, and accordingly over his nominee company, the second mortgagee, and over the respondent, who had acquired the second mortgage. Secondly, it was also contended that there was an equitable estoppel which precluded Frisina, and his successtors, from asserting priority for the second mortgage as against the appellants.

As to the second of these arguments, I adopt what was said by Laskin J.A. in the Court of Appeal, as follows:

> Before turning to examine the facts out of which the issues between the parties arise, it should be noted that the defendants did not and do not rely on any oral representations of Frisina to found their claim of estoppel; they rely only on such representations as are contained in written documents, to some of which the defendants became parties through agreements with Benvenuto. No attack was made on the validity of those agreements, and it is unreal to talk of estoppel so far as they are concerned. The defendants are entitled to whatever rights those agreements confer. But since the rights are against Benvenuto, the estoppel argument appears to amount to a contention that Frisina used Benvenuto as an instrument. In assessing this contention, it is a relevant consideration that those defendants who became original shareholders of Benvenuto when the complex transaction involved herein was carried through by Frisina, were represented by counsel. All interested parties had legal advice, and all documents were scrutinised and all transactions concluded with the participation of lawyers.
>
> . . . .
>
> It remains to deal with the defendants' submission of estoppel which was forcibly urged against the plaintiff's claim. The contention is that the alleged estoppel was operable against Frisina and that it was equally operable against Stein (and hence against the plaintiff) who had notice of the representations which are asserted as the basis for the defence of estoppel. Whether Stein and the plaintiff would be estopped in this case if this defence was established against Frisina does not arise for determination because, in my opinion, estoppel cannot be maintained against Frisina.
>
> I agree that estoppel may arise in respect of words or conduct that induce the representee to become party to a contract with another, and, equally, it may arise by reason of subsequent words or conduct that would preclude reliance on a previously concluded contract. But, in either case, there must be a representation from which the representor seeks to recede after it induced a detrimental change of position. I do not find in the present case any representation by Frisina to the defendants with reference to the subordination of his equitable charge or of the second mortgage to their rights of occupancy or with respect to the fragmentation of the amount owing on the second mortgage according to their outstanding liabilities to Benvenuto. Nor do I find any attempt to recede from such representations as Frisina may have made in any documents to which he was a party.

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Certainly, estoppel cannot be grounded on representations which are themselves terms of a bargain between the alleged representor and the alleged representees. The question in such case becomes one of construction and application of the bargain. As has already been stated, the representations relied on here are not oral but are those reflected in the written transactions. Two of them only need be mentioned. The agreement of June 15, 1959 preceded any relationships involving the defendants; its terms were not addressed to them. The offers to purchase which the defendants executed represented their bargain with Benvenuto. The balance of benefit and detriment under that bargain does not give rise to any issue of estoppel outside of it. The defendants got what they bargained for from Benvenuto; nothing was promised to them by Frisina personally. They cannot lay at his door any mistaken belief they may have had that the payments they were required to make under their agreements with Benvenuto would protect them against persons with rights in the property superior to those of Benvenuto. Their counsel admitted on appeal that there were no misrepresentations; and I note again that they had solicitors to guide them. In short, the defendants knew what was afoot and were not misled.

In my opinion the first and main submission of the appellants should also fail, for the following reasons:

Whatever rights the appellants acquired in relation to the lands in question were derived and could only be derived by virtue of their contracts with Benvenuto. In making those contracts, Benvenuto was contracting on its own behalf, as principal, and not as agent for Frisina. There were no representations made by Frisina on the basis of which any such agency could be established.

That being so, it is necessary to determine what rights Benvenuto had in relation to those lands, for it could not confer upon the appellants any rights greater than those which it, itself, had. Benvenuto's rights in respect of the lands were spelled out in its contract with Frisina, dated June 15, 1959. That was an agreement for the sale of the lands by Frisina to Benvenuto at a price of $844,500. Benvenuto, by virtue of that contract, obtained the right to acquire Frisina's equitable interest (the lands being subject to a legal mortgage), but subject to the terms of the agreement.

The lands were subject to a first mortgage in favour of The London Life Insurance Company, and Benvenuto's equitable interest in the lands, as purchaser under an agreement for sale, was, of course, subject to that. But in addition, Benvenuto had agreed, for consideration, that if it was unable to pay the whole of the balance of the purchase price of $534,500 on the closing date, Frisina should have

a second mortgage for the unpaid amount, "subject only to the said first mortgage to The London Life Insurance Company." Benvenuto's equitable interest in the lands was also subject to that, and Frisina, by virtue of the agreement to give a mortgage, retained an equitable charge on the lands, which would continue until he had been paid the full balance of the purchase price which Benvenuto had agreed to pay (*Rooker v. Hoofstetter*, (1895), 26 S.C.R. 41).

This being so, Benvenuto could not, itself, create any equitable interests in the lands which would not be subject to Frisina's interest, unless and until it had paid up the balance due. This situation is emphasized in the agreement in two respects. First is Benvenuto's covenant not to alienate or encumber, or cause to be alienated or encumbered, the lands in any manner whatsoever until the second mortgage had been registered. Second was the provision that Benvenuto would sell the exclusive right of occupancy of the suites in accordance with the terms and conditions set out in the Offer to Purchase. That form provided, as a part of the agreement with Benvenuto, that the parties to the agreement would not alienate or encumber, or cause to be alienated or encumbered, the lands, until the second mortgage had been registered. It also provided that the persons acquiring the occupancy of suites from Benvenuto would execute the agreement attached to the Offer to Purchase, before taking possession of their suites. The attached agreement provided that it should replace any previous agreement with reference to the ownership, use and occupancy of the suites. It contained a specific recital that the lands on which the apartment building had been erected were subject, in addition to the first mortgage, to a second mortgage in favour of Frisina.

The agreement of June 15, 1959, therefore contemplated that, in entering into agreements for the occupancy of suites, Benvenuto could only do so on the basis of an agreement with the occupants which specifically recognized the existence of a second mortgage on the whole of the lands and premises. Benvenuto, in dealing with the appellants, carried out this obligation. The fact that most of the appellants took possession of their suites before signing the final agreements with Benvenuto does not alter the position, in view of the fact that each suite occupant did sign such an agreement, which, by its terms, replaced all prior

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agreements, and which specifically acknowledged the amount of the second mortgage against the whole of the lands and premises.

The position is, therefore, that Benvenuto could not grant any right or interest in the lands which was not subject to the second mortgage, and that, in fact, it never purported to do so.

The agreement of Benvenuto to give a second mortgage to secure the balance of the purchase price was performed, and the second mortgage was executed and registered. For the above reasons it is my opinion that the second mortgagee had equitable rights prior to any rights of the appellants, which mortgagee's rights, in due course, were assigned to the respondent.

For these reasons, as well as those given by Laskin J.A. in the Court of Appeal, with which I agree, I would dismiss the appeal with costs.

Appeal allowed and trial judgment restored, with costs, MARTLAND J. *dissenting.*

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